

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

IN RE APPEAL OF PIONEER VALLEY (
TRANSIT AUTHORITY (
_____ (

D.T.E. 01-TD-3

BRIEF OF THE TRANSPORTATION DIVISION OF
THE DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

I. QUESTION PRESENTED

Whether the Order to remove advertising obstructing certain Pioneer Valley Transit Authority (“PVTA”) bus windows by the Director of the Transportation Division of the Department of Telecommunications and Energy violates G.L. c. 30A, §§ 1(5) and 3.

II. SHORT ANSWER

No. A specific regulation prohibiting hazardous obstruction of bus and light rail vehicle windows not required because the Department of Telecommunications and Energy (“Department”) was acting under its statutory duty to ensure PVTA’s safe operations, and under its jurisdiction to resolve disputes with PVTA and the MBTA; further, Department regulations provide the Department discretion to revoke or suspend PVTA bus permits should the Department determine it necessary for the protection of public safety.

III. BACKGROUND

- A. The Department found that certain advertising obstructing MBTA vehicle windows was a safety hazard and consequently directed the MBTA to remove such safety hazards.

On September 19, 2001, Chairman James Connelly requested that the MBTA remove that portion of the “Bus/full/ad/wrap” (“ad-wrap”) that covers any part of windows of MBTA buses and light rail vehicles within thirty days (Letter from Chairman James Connelly to MBTA (September 19, 2001)). Ad-wrap is a covering of an entire bus, excluding the windshield and driver’s side windows, with a special spray that creates an image for advertisements (id.). Passengers are able to see out of a bus window but individuals are unable to see to see in (id.).

The Chairman explained that “in light of the need for increased security because of recent events by terrorists . . . the Department has reached the conclusion that the ad-wrap on MBTA buses and light rail vehicles results in an unacceptable hazardous condition, and requests the MBTA to remove that portion of the wrap that covers any part of windows of the buses and Green Line cars within thirty days (id.).” The Chairman noted that “these [ad-wrapped] buses and subway cars can be conducive to the potential for on board crime (id.).”

The Chairman determined that removal of ad-wrap from windows of buses and trains was necessary for the protection of the public safety. The Chairman made this determination pursuant to the Department's legal duty to ensure safety of equipment and operations of the MBTA and RTAs pursuant to G.L. c. 161B, § 6(i); G.L. c. 161A, § 3(i); 220 C.M.R. § 155.00 et seq.; 220 C.M.R. 151.00 et seq.; Intermodal Surface Transportation Efficiency Act of 1991. Pub. L No. 102-40; 49 U.S.C. 5330 (1994); and 49 C.F.R. 659. For the Department to not exercise its duty to ensure safety of equipment of operations would be repugnant to G.L. c. 161B, § 6(i) and G.L. c. 161A, § 3(i).^{1,2}

On September 27, 2001, the MBTA responded that the MBTA police department supported the Department's decision to remove the wrap from all MBTA vehicles (Letter from MBTA Assistant General Manager for Safety to Department (September 27, 2001)). However, the MBTA requested an extension through November 30, 2001, due to contractual commitments (id.).

On October 2, 2001, the Commission found that it is not in the interest of public safety for the MBTA to keep the ad-wrap beyond the 30 days specified in the Chairman's letter of September 19, 2001, and directed the MBTA to remove that portion of the ad-wrap that covers any and all windows of buses or subway cars no later than October 19, 2001. MBTA Policy Concerning Bus and Light Rail Vehicles Ad-wrap, (October 2, 2001). The Commission issued this Order pursuant to G.L. c. 161A, § 3(i); 220 C.M.R. 151.00 et seq.; Intermodal Surface Transportation Efficiency Act of 1991. Pub. L No. 102-40; 49 U.S.C. 5330 (1994); and 49 C.F.R. 659. The MBTA complied without exception.

¹ The Department previously exercised its legal duty to ensure safety of equipment and operations pursuant to G.L. c. 161A, § 3(i) in Investigation re: Massachusetts Bay Transportation Authority, D.P.U. 19810 (1980). In that case, due to public safety concerns, the Department ordered, among other things, the MBTA to cease requiring or permitting motormen or operators of surface rail lines to continue on-duty, when such employee has been on-duty sixteen (16) consecutive hours, until such employee has had at least eight hours off-duty. There was no finding that the MBTA violated a specific "regulation," nor a requirement to promulgate one.

² G.L. c. 161B, § 6(i) applies to all regional transit authorities ("RTA") (including PVTA) and G.L. c. 161A, § 3(i) applies to the MBTA. Both portions of these statutes contain identical language (Department's duty to ensure "public safety"). Laws on the same subject are to be construed harmoniously with reference to one another. Butts v. Zoning Board of Appeals of Falmouth, 18 Mass. App. Ct. 249, 252 (1984).

- B. Consistent with Department's duty to protect public safety and the Department's prior Order to the MBTA, the Division Director of the Transportation Division directed PVRTA to remove certain advertising obstructing PVRTA bus windows because they were a safety hazard.

On September 20, 2001, pursuant to G.L. c. 161B § 6(i), and 220 C.M.R. § 155.00 et seq. the Director of the Transportation Division of the Department ("Division Director") explained to PVRTA, and all other transportation authorities under its jurisdiction that it is considering a change in the Department's safety of equipment and operations policy regarding ad-wrap (Division Director letter to PVRTA (September 20, 2001))." The Division Director also stated that whatever actions the Department takes with respect to the issue with the MBTA would be applicable to RTAs as well (id.).³ The Division Director requested that PVRTA inform the Transportation Division within seven days (1) whether PVRTA intended to remove the ad-wrap and (2) inform the Division of the number of ad-wrap buses in PVRTA's fleet (id. at 2). The Division Director also requested that PVRTA remove that portion of the wrap that covers any part of the windows of the buses it may have configured within thirty days (id.).⁴

PVRTA did not respond within seven days as requested. Instead, PVRTA responded on October 20, 2001. (PVRTA response to Division Director (October 20, 2001)). PVRTA stated that it would keep seven wrapped buses in service until the contracts with the ad companies' expire (id.). The PVRTA did not dispute the merits of the public safety initiative, only the timing of the wrap removal (id.). PVRTA stated that, due to contractual obligations, it did not intent to alter or remove its existing paid advertising wraps until the expiration of relevant contracts (id.). PVRTA's response, therefore, creates a conflict with the Department's previous directives.

On October 25, 2001 the Division Director directed PVRTA to remove that portion of the ad-wrap that covers any and all windows of the affected buses not later than November 14, 2001, or sooner, if possible. Policy Concerning "Bus/Full/ad Wrap (Order from Director of Transportation Division (October 25, 2001)). The Division Director acted within his authority to protect public safety, G.L. c. 161B, § 6(i) and to resolve PVRTA's dispute with the

Department concerning the timing of the removal of the bus wrap from PVRTA windows.

³ Included with this letter was Chairman Connelly's September 19, 2001 letter to the MBTA and a study describing the security hazards of ad-wrap. This letter and attachments was sent to RTAs and all private bus companies under Department jurisdiction.

⁴ The Department delegated to the Director of the Transportation Division the performance of certain functions relating to the administration and enforcement of the provisions of G.L. c. 159A, and G.L. c. 160. G.L. c. 25, § 10; Department Order re: Director of the Transportation Division, D.P.U. 94-154 (1994).

G.L. c. 161B § 16.⁵

In support of his decision, the Division Director stated that, on October 12, 2001, a DTE regulated private bus company's bus was attacked at the Dedham commuter rail station. Policy Concerning "Bus/Full/ad Wrap (Order from Director of Transportation Division (October 25, 2001)). The Division Director noted that this was a fully wrapped bus. Id. He further stated that the Dedham Police stated that a cruiser drove by the bus while the robbery was in progress, however, because the windows were wrapped, the officer could not see inside the bus to determine if anything unusual was taking place. Id. at 2.⁶

On November 1, 2001, PVRTA appealed the Division Directors Order. On November 22, 2001, PVRTA filed a brief in support of its appeal. PVRTA argues that the Department's safety policy must be addressed through a formal rulemaking proceeding pursuant to G.L. c. 30A, §§ 1(5) and 3.

IV. ARGUMENT

- A. The Department has jurisdiction over PVRTA to ensure safety of equipment and operations for the protection of public safety and to resolve disputes exercising such power as it deems necessary.

The Department regulates the private carriage of passengers for hire in motor vehicles. G.L. c. 159A. The Department is the designated oversight agency for Massachusetts Regional Transit Authorities ("RTAs") and the Massachusetts Bay Transportation Authority ("MBTA") for safety of equipment and operations pursuant to G.L. c. 161B, § 6(i); G.L. c. 161A, § 3(i); 220 C.M.R. § 155.00 et seq.; 220 C.M.R. 151.00 et seq.; Intermodal Surface Transportation Efficiency Act of 1991. Pub. L No. 102-40; 49 U.S.C. 5330 (1994); and 49 C.F.R. 659.

The Pioneer Valley Transit Authority ("PVRTA") is a RTA and thus subject to Department

⁵ In the event of any conflict between the regulatory powers and duties of the Department in respect to RTAs and the MBTA, the Department has authority "to resolve such dispute[s] and exercise such powers as [the Department] deems required in the particular instance." G.L. c. 161B, § 16; G.L. c. 161A, § 22. See Joint Petition of Island Transport, Inc. and Gay Head Sightseeing Company, Inc. D.T.E. 98-RB-112 (1999) (Department, pursuant to G.L. c. 161A, § 22, ordered Martha's Vineyard Regional Transit Authority to cease operation of the Vineyard Haven, Oak Bluffs, Edgartown service over the "back-road" on Martha's Vineyard and to pay compensation to Petitioners).

⁶ The Division Director also cited a number of other recent public transportation related incidents (id.).

oversight for safety of equipment and operations. G.L. c. 161B, § 6(i) and 220 C.M.R. § 155.00 et seq. As such, the Department has the authority to revoke or suspend a PVTa bus permit “for the protection of the public safety.” 220 C.M.R. § 155.02 (32).

- B. A regulation on ad-wrap is not required because the Department has a statutory duty to ensure “safety of equipment and operations”, G.L. c. 161B, § 6(i), and discretion to exercise such powers as the Department deems required to protect the public safety pursuant to G.L. c. 161B, § 16; therefore, the Department properly exercised its discretion and executed its duty.

On September 19, 2001, October 2, 2001 and October 25, 2001, the Department found that operators of buses and light rail vehicles must remove ad-wrap from windows due to public safety concerns. The Department provided just and reasonable explanation for its public safety policy regarding ad-wrap. Boston Gas Company v. Department of Public Utilities, 367 Mass 92, 104, 105 (1975); Robinson v. Department of Public Utilities, 416 Mass. 668, 673 (1993) (Department must explain reasons for policies before implementing them). For the Department to fail to execute its duty to protect public safety would be inconsistent with G.L. c.161B, § 6(i) and G.L. c 161A, § 3(i). The Division Director’s letter to all RTAs on September 20, 2001, with the Chairman’s September 19, 2001 letter attached put PVTa on notice about this policy.

The substance of the Chairman’s September 19, 2001 letter to the MBTA, pursuant to the Department’s duty to ensure safety of equipment and operations of the MBTA , G.L. c. 161A § 3(i), should also be construed to apply to RTAs. G.L. c. 161 B § 6(i).⁷ Similarly, the substance of the Commission’s October 2, 2001 Order to the MBTA, pursuant G.L. c. 161A § 3(i), to remove ad-wrap from windows of MBTA buses and trains no later than October 19, 2001, should also be construed to apply to RTAs. G.L. c 161B § 6(i).

The Division Director’s September 20, 2001 letter to PVTa and October 25, 2001 Order to PVTa was consistent with the Chairman’s and Departments actions. The Division Director’s actions in both instances were exactly following the direction of the Commission. G.L. c. 25, § 10.

The Department’s PVTa’s conflict with the Department concerns the timing of the removal of the ad-wrap and not the Department’s public safety policy. The Department has authority to resolve this conflict as it deems required in this instance. G.L. c. 161B, § 16; see G.L. c. 161A § 22 (application to MBTA). In this case, the Department, acting through the Division Director, exercised its authority to resolve this timing dispute and directed PVTa to remove ad

⁷ As noted above, G.L. c. 161A, §3(i) and G.L. c. 161B, § 6(i) contain identical language.

wrap.

In conclusion, any further regulation prohibiting ad-wrap is not required because the “safety of equipment and operations” is fully regulated by statute and the Department has authority to resolve its conflict with PVTa by “exercising such powers as it deems appropriate.” G.L. c. 161B, §§ 6(i), 16.

C. Since Department regulations already expressly provide for Department discretion to determine what constitutes protection of the public safety, no rulemaking is necessary to regulate the use of ad-wrap.

PVTa argues that a specific rule prohibiting ad-wrap is necessary to be inserted somewhere in 220 C.M.R. 155.00 et seq. The intent of these regulations are, in general, to establish mechanical condition criteria for Department inspectors to determine whether PVTa’s equipment and buses are unsafe. In contrast, G.L. c. 161B, § 6(i) discussed above, concerns Department authority over unsafe operations of PVTa’s buses. Notwithstanding this distinction, 220 C.M.R. § 155.00 does also provide Department discretion to suspend or revoke PVTa’s permit for the “protection of public safety” as it “deems advisable” 220 C.M.R. §§ 155.02.(32), 155.02 (30).

The Department’s regulations for the inspection of passenger motor vehicles for hire, and for the certification of the drivers of passenger motor vehicles for hire, 220 C.M.R. 155.00 et seq., pertain, among other things, to routine and necessary Transportation Division inspection of motor vehicles and other mechanical equipment to determine safety defects by a “Department inspector.” 220 C.M.R. § 155.03. The Department adopted federal inspection procedures required by the U.S. Department of Transportation for use by jurisdictions inspecting commercial motor vehicles as participants in Commercial Vehicle Safety Alliance as part of 220 C.M.R. § 155.00. See also, D.P.U. 93-179.

The Department inspector has the authority to “find a vehicle to be unsafe” if the inspector finds (1) the vehicle does not meet the specific equipment requirements of 220 C.M.R. § 155.04; (2) the vehicle meets “North American Uniform Vehicle Out of Service Criteria”; or (3) the vehicle has “safety related defects not identified in the “North American Uniform Vehicle Out of Service Criteria.” The Department inspector may order corrections of a safety defect. 220 C.M.R. § 155.05(5).

The Department has the authority to suspend or revoke PVTa’s bus permit(s) for the “protection of public safety pending a hearing.” 220 C.M.R. § 155.02(32). In this case, the Department has determined that, for the “protection of public safety” PVTa must remove ad-wrap from certain bus windows.

Finally, Department regulations provide that the criteria for determining if a vehicle unsafe

is“for general application and ... subject to such changes and modifications as the Department may, from time to time deem advisable. 220 C.M.R. § 155.02(30). Here, the Department deemed it advisable that it was in the public interest to prohibit the operation of those buses and light rail vehicles with ad-wrap on their windows. Therefore, no specific regulation on ad-wrap is necessary because 220 C.M.R. § 155.02 (30) provides for Department discretion to determine whether a specific safety related operational hazard exists, such as obstructed windows that pose a public safety hazard, in addition to those routine equipment-specific requirements subject to inspection by a Department inspector.

IV. CONCLUSION

For the reasons noted above, the Transportation Division recommends that the Department deny PVTA's motion (1) to transfer this appeal to Hampden Superior Court ; and (2) PVTA's alternative motion for the Department rule that the Division Director's Order of October 25, 2001 violates the Administrative Procedure Act and is of no force and effect.

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